

American Public Works Association

Your Comprehensive Public Works Resource

July 15, 2011

Via Electronic Filing

Ms. Marlene Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

RE: *Acceleration of Broadband Deployment*, WC Docket No. 11-59, Comments of the Oregon Chapter of the American Public Works Association

Dear Ms. Dortch:

The Oregon Chapter of the American Public Works Association (APWA) comprises more than 800 professional engineers, technicians, operations staff, public works directors, business people, contractors, consultants and many others who join together to exchange ideas and information, promote education and training, and work as a team to meet professional and community needs. The vast bulk of the facilities which our members construct and manage are located within the public rights of way of the state, county and local governments in Oregon. These facilities provide the essential services that make modern civilization possible – transportation (by vehicles, bicycles and pedestrians), wastewater conveyance and treatment, management of storm runoff, energy to power our businesses and home, and communications.

Because of this intense interest in the rights of way and their use in our society, the Oregon Chapter is pleased to have an opportunity to comment on the Federal Communications Commission's ("Commission") decision to inquire into the impact that local activities in managing those rights of way have on the Commission's goal of accelerating the deployment of advance broadband technology. We are concerned, however, that the inquiry proceeds from an assumption which our membership believes is not grounded in fact – that local government permitting activity is somehow an impediment to this deployment, and the inquiry ignores the many other uses of rights of way which our society requires.

The Notice of Inquiry ("NOI") in WC Docket Number 11-59 indicates the Commission "...seeks to work with stakeholders ...to reduce the costs and time required for broadband deployment... which will help unleash private investment in infrastructure...

¹ Unfortunately, it would appear that the NOI proceeds from a fatally flawed

¹ NOI, p.1



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fundamental assumption – that the only issue involved is the ability of, or limitations on, telecommunications utilization of the public rights of way (“ROW”).

This flawed assumption ignores the fact that the principal purpose that the citizens of a community have entrusted their government, be it local, state, tribal, or national, to manage certain portions of their property for the public good, is the movement of persons and goods in commerce. Long before the advent of modern telecommunications, in fact since the founding of the republic, it has been this purpose which underlay the legal concept that citizens could grant a limited subset of their rights to their property to be held in common by the government in trust, so that this purpose could be accomplished. In fact, this purpose is the ONLY purpose for which government has been granted that right².

Recognition of this fact immediately clarifies a number of the issues and questions raised by the NOI. Fundamental among these is the concept that any other use of public ROW (as distinguished from right of way acquired by private entities for particular purposes)³, is permissible only if, and to the extent such use does not impede the fundamental purpose.

Subsequently, of course, local governments have granted additional access to the public ROW. Historically, these have all been for purposes serving a perceived public good. Among those uses are the supply of potable water, the supply of electrical energy and natural gas for energy purposes (both power and heat), transport and disposal of waste generated by citizens, and conveyance and treatment of storm runoff that is created by the private use of private property. More recently still, a separate classification of utilities has come into existence to provide other services such as telephony, television, and advanced telecommunications services.

It is not clear from reading the NOI the extent to which the use of the term ‘right of way’ is designed to encompass solely rights of way in the traditional sense, or to include those grants which convey to the public some other level of authority with respect to utilities in general, or a subset of utilities in particular. In these comments, we will focus on issues that relate specifically to rights of way, since in most cases, the other limited grants of authority are expressly limited to the purposes stated in those grants, and to not extend a general right to make use of the underlying owners property. These situations are more comparable to the recent litigation wherein private property owners attacked actions by a number of railroads to grant access to the railroad rights of way to telecommunications companies. These grants were found to be beyond

² The right of way grant is legally distinguishable from other limited grants to government for the public use of private property. These grants include public utility easements (which convey a general ability to place “public utilities” within a private property owner’s property, or even more restricted easements for specific utility purposes, such as wastewater collection and conveyance. In this context the term public utility is defined, generally, in state law not federal law, and frequently refers only to such utilities as those providing electricity, water, and heat. For example, in Oregon, public utilities are defined separately from telecommunications utilities (compare, ORS 757.005(1) (a) and ORS 759.005(9) (a)).

³ Railroads and energy utilities are common examples of private entities which acquire rights of way through purchase, or in some cases, the exercised of authority conferred by the states to exercise rights of eminent domain.

the scope of the underlying grant from the fee owner to the railroad, and consequently, not within the railroad's power to convey.

Beyond the somewhat narrow question of legal authority to grant access to property held by the government as trustee, there are more significant practical issues which need to be considered as part of the matrix of factors which go into considering whether or not access to public rights of way can be facilitated by "...improving government policies for access to rights of way..."⁴ These issues may be grouped under the following general headings: 1) time and manner of access the public rights of way for purposes supporting the provision of advanced telecommunications services; 2) placement of facilities supporting advanced telecommunications services in rights of way, in relation to statutory and regulatory requirements with respect to other facilities existing within the rights of way, or with rights to exist within the rights of way; 3) preservation of the existing facilities located within the rights of way and of the traveling surface and appurtenances associated with the use of rights of way for the movement of persons and goods in commerce.

These comments will address each of those issues. They will not address other issues, such as the provisions of Section 253(c) of the Telecommunications Act of 1996, which provide for "... fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis..." This comment will discuss the recovery of the costs of preservation of the rights of way as a result of damage caused by the activities of telecommunications providers in placing facilities within the rights of way.

Public right-of-way is managed by local regulatory government agencies (agencies) to varying degrees depending on the agencies' particular circumstances. It is these differences that form the basis for inconsistencies alleged to be obstacles by telecommunication service providers and others. In fact, they are nothing more than the rules, codes and permit requirements each agency has adopted to represent the needs and interests of its residents, who are the ultimate owners of the rights of way. Please consider the following points:

1) Time and manner of access the public rights of way for purposes supporting the provision of advanced telecommunications services:

Access to the right-of-way is managed to ensure the public's safety as well as the safety of those working in the rights of way. This is achieved with traffic control plans, limited times of construction, limits of disturbance, required notification to emergency responders and other typical conditions of a permit. These construction specifications reflect local regulatory codes and are applicable to all permitted work within the right-of-way.

Permitting is a common mechanism for managing work within the right-of-way and governed by locally enacted and publicly noticed laws or administrative orders. The permitting process is not a barrier to any work, but rather a tool to facilitate the work of all interested parties, promote

⁴ NOI, paragraph 1.

efficiency and reduce unnecessary expense. Permitting allows for recording and documenting infrastructure and maintenance accountability. The information provided as part of the permitting process is often vital to later arriving utilities, such as broadband, in planning their installations. Permitting fees offset the cost to agencies reviewing and inspecting the activities in the rights of way.

2) Placement of facilities supporting advanced telecommunications services in rights of way, in relation to statutory and regulatory requirements with respect to other facilities existing within the rights of way, or with rights to exist within the rights of way;

As shown in the attached drawing, a typical street right-of-way is already a crowded place. It is home to many different essential utilities, most of which have unique specifications regarding their proximity to other infrastructure (potable water, wastewater, and natural gas for example). Placement of utilities in the right-of-way can be affected by the planning efforts undertaken by the agencies; upgrades and changes to the transportation system, urban renewal efforts and other planning issues. Communication between the municipality and the utility is a benefit to all parties, and as the "keeper" of documentation about the existing utilities in the right-of-way the municipality is in the position to assure that information can be shared efficiently and accurately.

3) Preservation of the existing facilities located within the rights of way and of the traveling surface and appurtenances associated with the use of rights of way for the movement of persons and goods in commerce;


Right-of-way infrastructure, such as, the streets, sidewalks, street lights, traffic signals, etc., contained within it, are public "assets", i.e. they have a monetary value to the citizens of the agency. An adequate and safe street network is an essential element of any viable community. Because of this, the agency which holds these assets in trust for the citizens must be scrupulous in assuring that when work occurs in the rights of way, the infrastructure will be restored to a condition at least as good as before the work occurred. Cities would breach their fiduciary responsibility if they permitted someone to use the citizen's property and damage it so that it did not serve its original purpose. Local citizens approve monies to be spent improving and/or maintaining their right-of-way system because they support its overall benefit to the community. They do this by approving local bond measures, local gas taxes and supporting budgets which include this work. As funding sources from state and federal sources have decreased, the community's monetary participation has increased proportionately. As a result there is a rising awareness of the impacts associated with use of the right-of-way and an expectation the public interest is being guarded.

In conclusion, The Oregon Chapter of APWA would like to thank the Commission for this opportunity to comment and for the Commission's efforts to better understand the practices and policies surrounding public agency management of public rights of way. We strongly encourage the Commission to consider these comments, as well as those submitted by others who manage and use the rights of way for its intended purposes, before taking any action that may adversely affect the agency authority and responsibility for right of way management. We respectfully ask

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the Commission to resist moving forward in any other context to act on any of the issues raised in the Notice until the record in this proceeding is complete.

Sincerely yours,


for - Mary Meloy,
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